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No. 99-8576

IN THE SUPREME COURT OF THE UNITED STATES

PAUL L. GLOVER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in rejecting petitioner's claim that his lawyers' failure to prevail on a particular Sentencing Guidelines argument before the district court, and their failure to renew that argument on direct appeal, constituted ineffective assistance of counsel.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is not reported, but the judgment is noted at 182 F.3d 921 (Table).

JURISDICTION

The judgment of the court of appeals was entered on July 15, 1999. A petition for rehearing was denied on October 7, 1999 (Pet. App. 8a). On December 16, 1999, Justice Stevens extended the time for filing a petition for a writ of certiorari to and including March 5, 2000, and the petition was filed on March 6 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on one count of racketeering conspiracy, in violation of 18 U.S.C. 1962(d); eleven counts of soliciting and receiving kickbacks, in violation of 18 U.S.C. 1954; two counts of money laundering, in violation of 18 U.S.C. 1956(a)(1)(B)(i); and four counts of filing false tax returns, in violation of 26 U.S.C. 7206. He was sentenced to 84 months' imprisonment, to be followed by three years of supervised release, and ordered to forfeit $325,000 and pay the cost of his prosecution. The court of appeals affirmed. United States v. Glover, 101 F.3d 1183 (7th Cir. 1996).

Petitioner thereafter filed a motion under 28 U.S.C. 2255 to vacate, set aside, or correct his sentence. The district court denied that motion, Pet. App. 3a-7a, and the court of appeals affirmed, id. at 1a-2a.

1. Petitioner was the Vice-President and General Counsel of the Chicago Truck Drivers, Helpers and Warehouse Workers Union (Independent) (the Union), a national labor union with more than 5,000 members, most of whom reside in the Chicago area. Petitioner was the Fund Manager, as well as a trustee, of the Union's Health and Welfare Fund, and was responsible for managing the Fund's day-to-day operations. He was also a trustee of the Union's Pension Fund. Petitioner was not authorized to make investment decisions for the Health and Welfare Fund without the

direction of that Fund's full Board of Trustees. See Glover, 101 F.3d at 1185.

Between 1986 and 1992, petitioner engaged in unauthorized transactions and made unauthorized investments with money from the Union's Pension and Health and Welfare Funds, for the purpose of obtaining kickbacks for himself and others. Glover, 101 F.3d at 1186-1188. Petitioner was eventually convicted of participating in a racketeering conspiracy, two counts of money laundering, 11 counts of soliciting and accepting illegal kickbacks, and four counts of filing false tax returns.

2. In determining petitioner's sentence, the district court concluded, over objection by petitioner's counsel, that petitioner's kickback offenses, his money laundering offenses, and his tax offenses should be "grouped" separately for purposes of determining his base offense level under the federal Sentencing Guidelines. See generally Guidelines § 3D1.2(d). The court then computed petitioner's base offense level as 24. It increased that level by two levels for obstruction of justice, because it concluded that petitioner had perjured himself at his first trial, and by an additional two levels because petitioner's offenses fell into more than one group of closely related counts. See Guidelines § 3D1.4. The resulting offense level of 28, combined with petitioner's criminal history category of I, produced a Guidelines sentencing range of 78 to 97 months' imprisonment, and the district court imposed a sentence of 84 months. Glover, 101 F.3d at 1189; Pet. App. 1a, 3a-4a.

3. Petitioner did not renew on direct appeal his objection to the district court's grouping of his offenses for Guidelines purposes. In a later motion filed under 28 U.S.C. 2255, however, petitioner again claimed that his money laundering offenses should have been grouped with his conspiracy and kickback offenses under Guidelines § 3D1.2. He argued that his previous counsel rendered constitutionally ineffective assistance by failing to press that argument "adequately" at sentencing, and by failing to raise it at all on direct appeal. Pet. App. 3a. Petitioner contended that, under a proper application of the Guidelines, his offense level should have been reduced from level 28 to level 26, his Guidelines range should have been 63-78 months' imprisonment, and his sentence should accordingly have been between 6 and 21 months lower than the 84 months imposed by the district court. Pet. App. 3a-4a.

The district court denied petitioner's motion. Pet. App. 3a-7a. The court held that even if counsel's failure to raise the grouping issue on appeal were considered constitutionally deficient, the potential sentence reduction resulting from the claimed error (6 to 21 months) was not sufficiently significant to establish the "prejudice" required to make out a claim of ineffective assistance under Strickland v. Washington, 466 U.S. 668 (1984). Pet. App. 5a-6a.

The court of appeals affirmed the denial of collateral relief. Pet. App. 1a-2a. In a short per curiam opinion, the court endorsed the district court's reasoning:

> Even if we were to assume that [petitioner's] attorneys performed inadequately [under Strickland], the second prong, prejudice, is missing here. [Petitioner] argues that his attorneys' failure to argue the correct interpretation of U.S.S.G. § 3D1.2 led to an adjusted offense level two levels higher than it should have been. This court has held that only a significant increase in the sentence rises to the level of the type of prejudice that will support an ineffective assistance of counsel claim on collateral attack.

Id. at 1a. The court held that a "potential decrease" of 6-21 months' imprisonment was "not sufficiently significant to be cognizable on collateral attack." Id. at 2a.

ARGUMENT

Petitioner contends that the court of appeals erred in applying the prejudice standard of Strickland v. Washington, 466 U.S. 668 (1984), to his claim of ineffective assistance of counsel at sentencing and on appeal (Pet. 8-14, 20-22), and that the Seventh Circuit's approach to evaluating such claims in cases involving application of the federal Sentencing Guidelines differs from that followed by other courts of appeals (Pet. 14-20). Those contentions do not warrant review in this case.

1. Claims of non-constitutional error are cognizable on collateral review only if they go to jurisdiction, or allege some other "fundamental defect" in the original proceedings that would, if substantiated, "inherently result in a complete miscarriage of justice." United States v. Addonizio, 442 U.S. 178, 185 (1979); see Reed v. Farley, 512 U.S. 339, 353-354 (1994); United States v. Timmreck, 441 U.S. 780, 784 (1979); Davis v. United States, 417 U.S. 333, 346 (1974); Hill v. United States, 368 U.S. 424, 428 (1962). Thus, "an error that may justify reversal on

direct appeal will not necessarily support a collateral attack on a final judgment." Addonizio, 442 U.S. at 184. In particular, "[b]arring extraordinary circumstances, * * * an error in the application of the Sentencing Guidelines cannot be raised" in a proceeding under 28 U.S.C. 2255, United States v. Pregent, 190 F.3d 279, 283-284 (4th Cir. 1999) (collecting cases), because "errors of guideline interpretation or application ordinarily fall short of a miscarriage of justice." United States v. Mikalajunas, 186 F.3d 490, 496 (4th Cir. 1999) (same), cert. denied, 120 S. Ct. 1283 (2000); see also, e.g., Jones v. United States, 178 F.3d 790, 796 (6th Cir.), cert. denied, 120 S. Ct. 335 (1999); cf. United States v. Talk, 158 F.3d 1064, 1069 (10th Cir. 1998) (assuming, without deciding, that a claim of a nine-level Guidelines error that would reduce a 108-month sentence by more than 50 months would be cognizable), cert. denied, 525 U.S. 1164 (1999).[1]

In light of these restrictions, Section 2255 petitioners commonly seek to raise arguments concerning Guidelines sentencing

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[1] Because petitioner did not raise his Guidelines claim before the court of appeals, even if such a claim were generally cognizable on collateral review, petitioner would have to show cause for his procedural default, and prejudice resulting from it. See United States v. Frady, 456 U.S. 152, 167-168 (1982); Murray v. Carrier, 477 U.S. 478, 492 (1986). In the circumstances of this case, a showing that establishes ineffective assistance of counsel under Strickland would likely also suffice to demonstrate cause and prejudice under Frady. See Murray, 477 U.S. at 488 (ineffective assistance satisfies "cause" requirement); see also id. at 496; Strickland, 466 U.S. at 694, 697-698; cf. Strickler v. Greene, 527 U.S. 263, 282, 296 (1999) (treating inquiries into prejudice under separate tests as substantially "parallel").

as petitioner does here (see, e.g., Pet. 9), by alleging that their previous lawyers rendered constitutionally ineffective assistance of counsel by failing to press those arguments adequately at trial or on appeal. As petitioner acknowledges (ibid.), however, an ineffective assistance claim may be made out only by demonstrating first that counsel's performance fell "outside the wide range of professionally competent assistance," and second that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 690, 694. Petitioner cannot meet that demanding standard.

a. To satisfy the first prong of the Strickland test, petitioner must establish that, with specific respect to his present Sentencing Guidelines claim, his former lawyers' performance was so deficient that they were "not functioning as the 'counsel' guaranteed by the Sixth Amendment." Strickland, 466 U.S. at 687. In analyzing such a claim, courts must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," and "every effort must be made to eliminate the distorting effects of hindsight * * * and to evaluate the conduct from counsel's perspective at the time." Id. at 689. Where the alleged error is the omission of a particular claim from the brief filed for petitioner on appeal, it must be borne in mind that the "process of 'winnowing out weaker arguments on appeal and focusing on' those more likely to prevail, far from being evidence of incompetence, is the hallmark

of effective appellate advocacy." Smith v. Murray, 477 U.S. 527, 536 (1986) (quoting Jones v. Barnes, 463 U.S. 745, 751-752 (1983)); see also Smith v. Robbins, 120 S. Ct. 746, 765 (2000) ("[I]t is still possible to bring a Strickland claim based on counsel's failure to raise a particular claim, but it is difficult to demonstrate that counsel was incompetent").

Here, the Presentence Report (PSR) prepared for petitioner's sentencing proposed grouping the money laundering and kickback counts together. The government objected, and the district court took the matter up at the sentencing hearing. Petitioner's counsel argued that the convictions resulted from "one joint effort" by petitioner and his co-conspirators, and that they were "appropriately grouped" by the PSR. Sent. Tr. 3-4. The court disagreed, and computed petitioner's Guidelines range by grouping the counts separately.[2] Petitioner's counsel chose not to raise that issue on appeal, focusing instead on other claims of trial and sentencing error. See United States v. Glover, 101 F.3d 1183, 1185 (7th Cir. 1996). In hindsight that decision may have been unfortunate, in light of the Seventh Circuit's decision, in

[2] At the time of petitioner's sentencing in September 1995, the Seventh Circuit had not considered the grouping issue, and several other circuits had sustained separate grouping in similar cases. Pet. App. 4a (citing United States v. Lombardi, 5 F.3d 568, 570-571 (1st Cir. 1993); United States v. Taylor, 984 F.2d 298, 303 (9th Cir. 1993); United States v. Smith, 13 F.3d 1421, 1428 (10th Cir.), cert. denied, 513 U.S. 878 (1994)). There was also authority in other circuits to support grouping money laundering and fraud counts together. See United States v. Leonard, 61 F.3d 1181, 1185-1186 (5th Cir. 1995); United States v. Cusumano, 943 F.2d 305, 312-313 (3d Cir. 1991), cert. denied, 502 U.S. 1036 (1992).

an opinion issued a month after the argument in petitioner's case, to require grouping in a case involving money laundering and mail fraud offenses. United States v. Wilson, 98 F.3d 281 (7th Cir. 1996). Considering the matter from counsel's perspective at the time they acted, however, the omitted claim was not "clearly stronger than [the] issues that counsel did present." Smith v. Robbins, 120 S. Ct. at 766. There is accordingly no reason to conclude that counsel's "winnowing" of the issues for appeal was "an unreasonable [decision] that only an incompetent attorney" would have made, see Garrett v. United States, 78 F.3d 1296, 1305 (8th Cir.), cert. denied, 519 U.S. 956 (1996), or otherwise represented anything other than a tactical choice falling "well within the 'wide range of professionally competent assistance' required under the Sixth Amendment." Smith v. Murray, 477 U.S. at 536 (quoting Strickland, 466 U.S. at 690).[3]

b. The court of appeals, focusing on the "prejudice" prong of Strickland, took a different route to the conclusion that petitioner's ineffective-assistance claim lacks merit. That court has previously noted that "[a]lmost any error at sentencing may be recast as a challenge to counsel," and has stressed the need to prevent ineffective-assistance claims from becoming "the means of vindicating on collateral attack all manner of arguments

[3] If failure to raise any arguable Guidelines issue on appeal were an error amounting to deficient performance, cf. Pet. 22-23 & n.10, and if any potential increase in a defendant's sentence were deemed inherently "prejudicial," see Pet. 12-14, then there would be little left of the rule against collateral review of routine sentencing claims, see pp. 5-6, supra.

under rules and statutes." Durrive v. United States, 4 F.3d 548, 550 (7th Cir. 1993). Focusing on the concern expressed in Lockhart v. Fretwell, 506 U.S. 364 (1993), with reliability and fundamental fairness, as those concepts have been understood in the context of collateral review, Durrive held that while "[g]rave errors by judge and counsel might make a sentence under the Guidelines 'unreliable or . . . fundamentally unfair,'" a likely difference in sentence must be "significant" before it can amount to the "prejudice" required to establish a Sixth Amendment violation and justify collateral review. Id. at 551. By contrast, the court observed, "[a]djusting the offense level by two or three steps is exactly the [sort of] routine decision that is supposed to be handled at sentencing and on direct appeal." Ibid. Applying that test here, the court of appeals held that the potential difference in sentence involved in petitioner's claim that his Guidelines range should have been "6 to 21 months lower than the 84-month sentence he received * * * is not sufficiently significant to be cognizable on collateral attack." Pet. App. 1a-2a.

2. Petitioner contends (Pet. 14-20) that the Seventh Circuit's approach to the prejudice inquiry in Guidelines sentencing cases conflicts with that of other courts of appeals.[4] Any such

[4] Petitioner also argues (Pet. 12-13) that the Durrive rule cannot be reconciled with cases such as Argersinger v. Hamlin, 407 U.S. 25, 37 (1972), which held that a defendant has the right to counsel in any proceeding that results in imprisonment. There is, however, a fundamental difference between cases like Argersinger, in which the defendant had no counsel at all, and cases like this one, in which the defendant was represented throughout

conflict is irrelevant to the outcome of this case, because petitioner cannot demonstrate that his counsel's performance was deficient, so that his ineffectiveness claim fails without regard to prejudice. See pp. 7-9, supra. In any event, any divergence in approach among the courts of appeals would not warrant review at this time.

As petitioner notes (Pet. 18-19), the Tenth Circuit relied on Durrive's analysis in United States v. Kissick, 69 F.3d 1048, 1055-1056 (1995).[5] Durrive itself relied on Spriggs v. Collins, 993 F.2d 85, 88 (5th Cir. 1993), which cautioned that "[i]n order to avoid turning Strickland into an automatic rule of reversal [on collateral review] in the non-capital sentencing context, * * * a court must determine whether there is a reasonable probability that but for trial counsel's errors the defendant's non-capital sentence would have been significantly less harsh."

In one of the two published opinions in which other courts of appeals have expressly addressed Durrive, the Fifth Circuit has recently suggested that Durrive may have read Spriggs too

the proceedings, but later claims that his lawyer's performance fell below constitutionally acceptable standards in one or more respects. Where a defendant had no counsel, prejudice is presumed; but where the claim is ineffectiveness, it must be demonstrated. See, e.g., Roe v. Flores-Ortega, 120 S. Ct. 1029, 1037-1038 (2000); Smith v. Robbins, 120 S. Ct. at 764-765.

[5] Kissick held that an error that would have reduced the applicable Guidelines range from 324-405 months to 262-327 months was prejudicial under the Durrive standard, where the district court had characterized the applicable provisions as "harsh" and had sentenced the defendant to 328 months, near the lower end of the range it thought applicable. No court of appeals other than the Seventh Circuit has published a decision relying on the Durrive test to reject a claim of ineffective assistance.

broadly. United States v. Phillips, No. 98-50062, 2000 WL 390496, at *4-*5 & n.4 (Apr. 18, 2000). In the second such opinion, the Sixth Circuit, while agreeing with Durrive that "'slight failings' by counsel" should not be sufficient to justify collateral relief, has "question[ed]" whether that issue is best addressed under the "prejudice" prong or the "performance" prong of Strickland. See Arredondo v. United States, 178 F.3d 778, 784 (1999). Neither Phillips nor Arredondo, however, involved a sentencing error that would likely have failed the Seventh Circuit's "significance" test. See Phillips, 2000 WL 390496, at *4 (increase of at least 37 months); Arredondo, 178 F.3d at 784 (declining to resolve "degree of prejudice" required because "[e]ven under a heightened standard * * * [an error] which may have increased [the] sentence by as much as eight years" is sufficient to show prejudice).

The remaining cases petitioner cites (Pet. 15-19) do not discuss Durrive, and also involved different facts (as well as often distinct legal claims), including longer potential increases in sentence than the 6-21 months at issue in this case. In United States v. Granados, 168 F.3d 343, 345-346 (8th Cir. 1999) (per curiam), for example, the court held that the defendant had shown Strickland prejudice where he "was sentenced to serve an additional forty to fifty months because his attorney was not familiar with the Guidelines and failed to challenge the government's breach of its plea agreement," and where the defendant might not have pleaded guilty if he had been competently

advised. Similarly, in United States v. Thompson, 27 F.3d 671, 675 (D.C. Cir.), cert. denied, 513 U.S. 1050 (1994), a case resolved on direct appeal (rather than on collateral review), the court sorted out a somewhat confused set of factual and legal contentions by concluding that if he had been properly advised the defendant might have pleaded guilty earlier, entitling him to a further reduction in offense level and thus to a reduction in sentence of 33-98 months. In United States v. Soto, 132 F.3d 56 (D.C. Cir. 1997), also on direct appeal, the court found prejudice from a potential sentencing difference of 17-30 months. These cases do not establish any conflict with the Seventh Circuit's approach. Compare Paters v. United States, 159 F.3d 1043, 1045-1047 & n.4 (7th Cir. 1998) (Durrive test does not apply to allegation that but for deficient counsel, defendant would have pleaded guilty; suggesting in dictum that 24-43 month potential reduction in sentence would be "significant" under Durrive).[6]

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[6] See also United States v. Ford, 918 F.2d 1343, 1350 (8th Cir. 1990) (decided on direct appeal) (difference of at least 38 months was "so serious that it deprived [the defendant] of a fair sentence"); United States v. Ford, 983 F.2d 897, 898-899 (8th Cir. 1993) (in same case on later collateral proceedings, defendant barred from raising further sentencing challenges; while Section 2255 petition "summarily mentioned ineffective assistance as cause to excuse his default" of those issues on appeal, "he has failed to show that appellate counsel performed deficiently in failing to raise these issues on direct appeal, and that counsel's deficient performance prejudiced him," citing Strickland). United States v. Palomba, 31 F.3d 1456, 1465-1466 (9th Cir. 1994) (a direct appeal case), and Jackson v. Leonardo, 162 F.3d 81, 86 (2d Cir. 1998), both involved challenges to the validity of one of the defendant's convictions, not merely claims of error under the Sentencing Guidelines.

Finally, even if there were a square conflict in the circuits, review would not be appropriate at the present time. In adopting the Durrive rule, the Seventh Circuit relied heavily on this Court's reasoning in Lockhart v. Fretwell. See Durrive, 4 F.3d at 550-551. This Court has recently clarified the meaning and scope of Lockhart's statement, on which Durrive relied, that "[a]n analysis focussing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective." See Williams v. Taylor, supra, slip op. 27-33. Moreover, the Fifth Circuit has recently questioned Durrive's reading of that court's decision in Spriggs, on which the Seventh Circuit also relied to some extent. United States v. Phillips, supra. Until the Seventh Circuit has had a chance to reassess Durrive's reasoning in light of Williams and Phillips, review of the issue by this Court would be premature.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2000

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GLOVER, PAUL L. Petitioner	)	
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CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served copies of the **BRIEF FOR THE UNITED STATES IN OPPOSITION** by first class mail, postage prepaid, on this 22nd day of May 2000.

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